No. 1026

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, APPELLANT

v.

AMERICAN UNION TRANSPORT, INC., D. C. ANDREWS & CO., INC., ATLANTIC FORWARDING CO., INC., ET. AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of New York

Civil Action No. 20–360

AMERICAN UNION TRANSPORT, INC., ET AL.,
PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, the United States of America herewith submits its statement showing the basis of the jurisdiction of the Supreme Court to review on appeal the final decree rendered by the above-entitled court in the above-entitled proceeding.

The date of the final decree of the District Court of the United States for the Southern District of New York is November 30, 1944. The petition for appeal is dated January 26, 1945.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

The statutory jurisdiction of the Supreme Court to review by direct appeal the decree complained of is conferred by Section 31 of the Shipping Act of 1916 (39 Stat. 738; 46 U. S. C. 830),

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the Urgent Deficiencies Act of 1913 (38 Stat. 220; 28 U. S. C. 47, 47 (a)), and Section 238 of the Judicial Code (43 Stat. 938; 28 U. S. C. 345). The provisions in question read as follows:

1. Shipping Act, 1916, Section 31:

> The venue and procedure in the courts of the United States in suits brought to enforce, suspend or set aside in whole or in part, any order of the board, except as otherwise provided for, shall be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district courts having jurisdiction over the parties.

2. Title 28, United States Code, Section 47:

> * * * An appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (October 22, 1913, c. 32, 38 Stat. 220.)

3. Title 28, United States Code, Section 47 (a):

> A final judgment or decree of the district court in the cases specified in section

44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the state. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title * * *. (March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; October 22, 1913, c. 32, 38 Stat. 220.)

4. Judicial Code, Section 238:

A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * *

(4) So much of "An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes," approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in

suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

The following cases are believed to sustain the jurisdiction of the Supreme Court: *California* v. *United States*, 320 U. S. 577; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297.

STATUTE OF THE UNITED STATES INVOLVED

The validity of a statute of a state, or statute or treaty of the United States is not involved. The decree complained or construed adversely to the contentions of the defendant, the United States of America, certain provisions of the Shipping Act of 1916 (39 Stat. 738; 46 U. S. C. 801, et seq.), particularly Sections 1 and 21 of said act which are, in pertinent part, as follows:

> Section 1 (46 U. S. C. 801):
>
> When used in this Act:
>
> The term "common carrier, by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."
>
> The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water

of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

The term "other person subject to this Act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

The term "person" includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

* * * * * *

Section 21 (46 U. S. C. 820):

The commission may require any common carrier by water, or other person subject to this chapter, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report, or any account, record, rate, or

charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, rate, charge, or memorandum shall be under oath whenever the board so requires, and shall be furnished in the form and within the time prescribed by the commission. Whoever fails to file any report, account, record, rate, charge, or memorandum as required by this section shall forfeit to the United States the sum of $100 for each day of such default.

* * * * *

THE NATURE OF THE CASE

The United States Maritime Commission, on August 21, 1942, ordered a general investigation into certain practices of persons engaged in the Port of New York area in the business of freight forwarding in foreign commerce. On January 14, 1943, the Commission issued its order pursuant to Section 21 of the Shipping Act, *supra,* requiring the disclosure of certain specified information, within a designated time limit, by plaintiffs and other persons so engaged.

Thereafter, on February 10, 1943, plaintiffs instituted this suit against the United States under the provisions of Title 28, Sections 41 (28), 43–48, and Title 46, Section 830, of the United States Code, seeking to set aside, annul, and enjoin the Commission's order of January 14, 1943, and also the Commission's general investigative

order of August 21, 1942. On May 18, 1943, the Commission withdrew its order of January 14, 1943, but on the same date issued a substitute order under Section 21 of the Shipping Act, which, like the order withdrawn, required plaintiffs within a specified time to answer a questionnaire annexed thereto. By consent of both parties, the suit was continued, without formal amendment of the complaint, against the Commission's substituted order of May 18, 1943.

On June 15, 1943, the defendant filed its answer to the complaint and on July 2, 1943, moved for a summary judgment in its favor upon the pleadings, certain affidavits and exhibits, and the record previously made in a hearing before the Commission pursuant to the general investigative order of August 21, 1942. On July 14, 1943, plaintiffs moved for an interlocutory injunction against the enforcement of the Commission's order of May 18, 1943 and its general investigative order of August 21, 1942.

On November 30, 1943, a statutory three-judge court, convened pursuant to the provisions of Title 28, Section 47, of the United States Code, denied plaintiffs' motion for an interlocutory injunction against the general investigative order, but granted an interlocutory injunction against the order of May 18, 1943. On defendant's motion for reargument, the court, on March 7, 1944, adhered to its ruling and on November 30, 1944, on final hearing, issued a decree setting aside and

permanently enjoining the enforcement of the Commission's order of May 18, 1943. That decree is the subject of this appeal.

THE QUESTION IS ONE OF SUBSTANCE

The District Court, in enjoining the Commission's order of May 18, 1943, ruled that plaintiffs, although admittedly forwarders of freight for ocean shipment in foreign commerce, are not engaged in the "business of forwarding * * * in connection with a common carrier by water" so as to make them responsive as "other persons subject to" the Shipping Act (Section 1, *supra*) to orders of the Maritime Commission issued pursuant to Section 21 of that Act. By the adoption of a restrictive interpretation of the words "in connection with a common carrier by water," the court has excluded from the Act's coverage all forwarders of freight for water shipment save only those who, in the court's language, are "a corporation subsidiary to or otherwise affiliated with the carrier," or those "to whom the carrier pays compensation as an inducement to ship by its line."

This construction of the Shipping Act not only denies to the Commission the right under Section 21 to require reports pertaining to the practices of freight forwarders concerned with the movement by water of goods in foreign and interstate commerce (except to the limited extent

expressed by the court), but removes such forwarders from the ambit of the Commission's regulatory power and the requirements and prohibitions in Sections 15, 16, 17, 20, 22, and 23 of the Shipping Act. The question is thus one of importance, as is evidenced by the number of plaintiffs (65) involved in this suit and the fact that many other independent freight forwarders carry on business in all the major ports of the United States.

We believe that there are substantial grounds for the contention that the court's ruling was in error. The business of forwarding is of long standing and has been precisely defined on many occasions. See *Place* v. *Union Express Co.*, 2 Barb. 19, 25 (N. Y. 1858), ("A forwarder is one who, for a compensation, takes charge of goods entrusted or directed, and forwards them, that is, puts them on their way to their destination by the ordinary and usual means of conveyance * * *"); *In re Emerson Marlowe & Co.*, 195 Fed. 95, 98 (C. C. A. 7), in which a definition of "forwarder" appearing in the Century Dictionary is quoted with approval as follows:

> Specifically in the United States, one who ships or sends forth goods for others to their destinations by the instrumentality of third persons * * *. Neither a consignor shipping goods, nor a carrier engaged in transporting them is a forwarder. The

> name is applied strictly to one who undertakes to see the goods of another put in the way of transportation without himself incurring the liability of a carrier to deliver them.

The Congressional intent to bring within the Shipping Act all segments of this industry, so far as connected with the transshipment of goods by water, may reasonably be inferred from the Act's language. The provision that the business of forwarding be carried on "in connection with a common carrier by water," in the absence of any evidence of a legislative intent to the contrary, is fully explained by the necessity of excluding forwarders whose business is solely in connection with commerce not regulated by the Act, such as forwarders operating in connection with rail or truck shipments. The manifest general purpose of the Act to remove potential obstructions and burdens on foreign and interstate marine transportation can best be achieved by construing the auxiliary field of regulation ("other persons subject to the Act") as coextensive with the field covered by the primary regulation.[1] Just as there could be no basis for construing the Act to cover

[1] The court in its opinion indicated that it deemed that the sole purpose of the Act was to prevent discrimination against shippers. That this view is incorrect is manifest from provisions of the Act obviously designed to prevent unfair competitive practices between the carriers themselves. See, e. g., the provision of Section 14 (46 U. S. C. 812) relating to "fighting ships."

freight forwarders not connected with the primary field of regulation—marine transportation in foreign and interstate commerce—so there is no basis for construing it to exclude any freight forwarders who are concerned with the main field of regulation. Any requirement that the Commission's jurisdiction over forwarders be made to turn on fine distinctions as to the degree of the forwarder's affiliation with or control by a carrier is unwarranted, we believe, in view of the broad language actually employed and the liberal construction to which remedial legislation such as the Shipping Act is entitled. Improper practices by freight forwarders may be deleterious to the interests of shippers and carriers alike, irrespective of whether the forwarder is independent of or is affiliated with any particular carrier.

The ruling of the District Court in the instant case would seem to be contrary to the decision in *California* v. *United States*, 320 U. S. 520, where it was argued that the State of California and the City of Oakland, owners and operators of various terminal facilities in the San Francisco Bay area, were not in "the business of * * * furnishing * * * warehouse or other terminal facilities in connection with a common carrier by water" so as to constitute them "other persons subject to" the act within the meaning of Section 1 thereof, because such services were furnished to the consignee and the water carrier had

no interest therein. (See Brief for the State of California, pp. 122–126, in No. 20, October Term 1943, and Brief for the City of Oakland, pp. 102–106 in No. 22, October Term 1942.) The court summarily disposed of this contention, stating (320 U. S. at 586):

> And whatever may be the limitations implied by the phrase "in connection with a common carrier by water" which modifies the grant of jurisdiction over those furnishing "wharfage, docks, warehouses, or other terminal facilities", there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission.

Similarly, we believe, there should be no doubt as to the Commission's jurisdiction over the activities of the plaintiffs.[2]

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[2] The case relied upon by the court, *LeHigh Valley Railroad Co.* v. *United States*, 243 U. S. 444, is not controlling. It was there held that the services of a forwarder in advertising and soliciting traffic for the railroad, "although connected with" railroad transportation "in a practical sense," "were not connected with it as a necessary part of the carriage—were not 'transportation service'" (243 U. S. 446–447) so as to permit allowance by the railroad, otherwise prohibited, to the forwarder of reduced rates or rebates permitted by Section 15 (13) of the Interstate Commerce Act (49 U. S. C. Sec. 15). The holding that the services of the forwarder were not a necessary part of the carriage is irrelevant in the present circumstances since no such requirement for the exercise of jurisdiction exists in the Shipping Act.

There are appended hereto copies of the decisions and decree of the court.

THE UNITED STATES OF AMERICA,
By (Sgd) CHARLES FAHY,
Charles Fahy,
Solicitor General.

By (Sgd) JOHN F. X. McGOHEY,
John F. X. McGohey,
United States Attorney.

United States District Court, Southern District of New York

Civ. 20/360

AMERICAN UNION TRANSPORT, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

Suit by American Union Transport, Inc., and others to obtain an injunction against enforcement of an order of the Maritime Commission.

Harold L. Allen, Attorney for plaintiffs.

John F. X. McGohey, United States Attorney, for defendant; Marvin M. Notkins, Assistant United States Attorney, of counsel.

Before SWAN, Circuit Judge, and CAFFEY and COXE, District Judges.

SWAN, C. J.

This case is now before us on final hearing. The evidence introduced is identical with that presented when the plaintiff's motion for interlocutory injunction and the defendant's motion for summary judgment were heard. At that time the court rendered an opinion which is reported in 55 F. Supp. 682. We see no reason to add anything to that opinion. Nor are our findings of fact on

final hearing different in any material respect from those made when the motion for interlocutory injunction was under consideration. The plaintiffs are entitled to a permanent injunction against enforcement of the order of the Maritime Commission dated May 18, 1943. Dated: November 29, 1944.

[s] THOMAS W. SWAN,
U. S. Circuit Judge.

[s] ALFRED C. COXE,
U. S. District Judge.

[s] FRANCIS G. CAFFEY,
U. S. District Judge.

FILED NOV. 30, 1944.

American Union Transport, Inc., et al. v. *United States.* District Court, S. D. New York. Nov. 30, 1943. On Rehearing March 7, 1944.

SWAN, Circuit Judge.

The plaintiffs are corporations, partnerships and individuals engaged in business in the Port of New York as forwarders of freight in foreign commerce. Alleging that they are not persons subject to the Shipping Act of 1916 and the amendments thereof, 46 U. S. C. A. Chap. 23, §§ 801–842, they brought this suit against the United States pursuant to § 31 of the Shipping Act, 46 U. S. C. A. § 830, whereby the venue and procedure in suits to restrain enforcement of any order of the Maritime Commission are made the same as in similar suits respecting orders of the

Interstate Commerce Commission. See 28 U. S. C. A. §§ 41 (28), 43–48. The complaint attacks two orders of the Maritime Commission made on August 21, 1942, and January 14, 1943, respectively.

The order of August 21, 1942, recites that each of the plaintiffs and others similarly engaged in "the business of forwarding in foreign commerce" is an "other person subject to this Act" within the meaning of that term as used in §§ 1 and 17 of the Shipping Act, 46 U. S. C. A. §§ 801, 816; that a specified corporation (not one of the plaintiffs) had engaged in practices which violated section 17 of the Act; and that the public interest requires a general inquiry to determine the extent of the existence of such practices among other forwarders in the Port of New York. It ordered that the Commission upon its own motion and without formal pleading "enter upon an investigation with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record"; and that the plaintiffs and other forwarders named in an appendix to the order be made respondents in the proceeding. After the issuance of this order the Commission sent to all the respondents named therein a questionnaire which propounded, among other questions, the following: "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce." All

the plaintiffs answered this question in the affirmative, but allege in their complaint that this answer was erroneous. Thereafter on December 9 and 10, 1942, public hearings were held, and on the date last named the hearing was adjourned sine die to enable the Commission to obtain further information for a later resumption of the investigation. On January 14, 1943, the Commission on its own motion and purporting to exercise powers conferred by section 21 of the Act, 46 U. S. C. A. § 820, ordered the plaintiffs and others to answer within 30 days a questionnaire which required a lengthy report of business they had transacted in specified periods during 1940, 1941 and 1942, with break-downs of their receipts and disbursements. The plaintiffs thereupon brought the present suit.

A motion for an interlocutory injunction being made, a court of three judges was formed pursuant to 28 U. S. C. A. § 47. Thereafter the defendant filed its answer and moved for summary judgment in its favor upon the pleadings, exhibits, affidavits and evidence introduced at the Commission's hearings. Both motions were heard together on July 15, 1943. Decision was deferred at the request of the parties in order that they might later submit briefs, which they have done.

From the defendant's answer and exhibits attached thereto it appears that on May 18, 1943, the Commission vacated its order of January 14, 1943 and substituted therefor another order and ques-

tionnaire which required a similar but somewhat less burdensome report of business to be filed by the plaintiffs within 45 days from the date of the order. The plaintiffs have not formally amended their complaint to cover the May 18th order but both parties desire us to pass upon the validity of that order. Consequently we shall proceed upon the assumption that the complaint has been amended so that all allegations as to the order of January 14, 1943, except those referring to failure to submit the questionnaire to the Director of the Budget, now refer to the order of May 18th.[1]

In respect to the order of August 21st the plaintiffs must fail. This is not the kind of order which the District Court is given jurisdiction to annul under 28 U. S. C. A. §§ 41 (28), 46, 47 See *United States* v. *Illinois Cent. R. Co.*, 244 U. S. 82, 89, 37 S. Ct. 584, 61 L. Ed. 1007; *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 47 S. Ct. 413, 71 L. Ed. 651; *Shannahan* v. *United States*, 303 U. S. 596, 601, 58 S. Ct. 732, 82 L. Ed. 1039; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 130, 59 S. Ct. 754, 83 L. Ed. 1147. The order of August 21st does not of itself adversely affect the plaintiffs; although it recites that they are subject to the Act, it does not con-

[1] The defendant's answer alleges that the Director of the Budget approved the form and contents of the questionnaire annexed to the order of May 18th. See sec. 5, 56 Stat. 1078, 50 U. S. C. A. Appendix, § 139c.

strain them to do or refrain from doing anything; their rights will be adversely affected only on the contingency of future administrative action. It is like an order of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction, as in the Illinois Central case, supra. Whether the Maritime Commission has jurisdiction to enter, on its own motion, upon a general investigation of the practices of freight forwarders is immaterial so far as the August 21st order is concerned. Even if jurisdiction were lacking, the order directing the investigation did not adversely affect the plaintiffs; nor does that part of the order which names them as respondents. They are under no constraint to appear at the investigation, if hearings shall be resumed.

The situation is different with respect to the May 18th order. This directs affirmative action on the part of the plaintiffs, and for failure to comply with the order the statute imposes a penalty at the rate of $100 for each day of default. 46 U. S. C. A. § 820. The power of the Commission to make such order being in dispute, the need for injunctive relief is at least as great as it is with respect to orders of the type discussed by Mr. Justice Frankfurter as "Group (2)" in the Rochester Telephone opinion, 307 U. S. at pages 132–134, 59 S. Ct. at pages 758, 759, 83 L. Ed. 1147. If the Commission has exceeded its statu-

tory powers, this court has jurisdiction to enjoin enforcement of the order. 46 U. S. C. A. § 830; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, 562, 39 S. Ct. 375, 63 L. Ed. 772.

The order purports to be issued pursuant to § 21, 46 U. S. C. A. § 820, which authorizes the Commission to require "any common carrier by water, or other person subject to this chapter" to file "any periodical or special report" or "any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter." Unless the plaintiffs are persons "subject to" Chapter 23 of Title 46 the Commission lacks power to require them to file with it answers to the questionnaire annexed to the order of May 18th. Whether the chapter does subject them to its provisions turns upon the definitions contained in § 1, 46 U. S. C. A. § 801, and the nature of the plaintiffs' business. The section begins with a definition of the terms "common carrier by water in foreign commerce" and "common carrier by water in interstate commerce." It then defines "common carrier by water" as meaning either of such previously defined common carriers. Next follows the definition which has given rise to the present litigation: "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock,

warehouse, or other terminal facilities in connection with a common carrier by water."

There is no substantial dispute as to the plaintiffs' business activities. The complaint alleges that all of the plaintiffs are engaged in the business of shippers' agents and freight brokers in the Port of New York; they arrange, as agents for others, "for insurance, cartage, warehousing, and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States, from and to points outside thereof"; they do not assume responsibility for delivery of the merchandise at destination. The affidavit of Herbert A. Byrne attached to the motion for an interlocutory injunction describes in greater detail how the business is done. There is nothing before us which contradicts in any essential respect his statements. He makes it clear that the "forwarder" acts solely as agent for the owner of goods in procuring their transportation by a common carrier by water and in performing services incidental to procuring such transportation. Usually the bill of lading is taken in the name of the owner of the goods; occasionally the forwarder may consolidate into one shipment goods of different owners, if the goods are similar in character and bound for the same port and the same consignee, and in the case of such a shipment the bill of lading is taken in the name of the forwarder. But in either case

the forwarder's relationship to the owner is that of agent and his relationship to the carrier is that of shipper's agent or shipper. See *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444, 445, 37 S. Ct. 434, 61 L. Ed. 839.

The question for decision is whether the activities above outlined constitute carrying on the business of forwarding "in connection with a common carrier by water." If the forwarder's connection with the carrier need be nothing more than the making of contracts of affreightment, either in the name of the owner of the goods to be transported or in the forwarder's own name, then plainly the plaintiffs are persons subject to the Act. But in our opinion the statutory clause under consideration contemplated a relationship between forwarder and carrier closer than that resulting merely from a contract of affreightment. The Shipping Act was a comprehensive measure intended to subject common carriers by water to substantially the same type of regulation as the Interstate Commerce Act, 49 U. S. C. A. § 1 et seq., imposed on interstate common carriers by land. See *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 480, 52 S. Ct. 247, 76 L. Ed. 408. The incidence of regulation was intended to fall upon the carrier and those who act in connection with it in such a manner as to make possible discrimination between shippers. Some large steamship companies maintain their own

forwarding organizations. See House Report No. 1682, 77th Congress, 2d Session. Such an organization may take the form of a corporation subsidiary to or otherwise affiliated with the carrier, or may be an independent forwarder to whom the carrier pays compensation as an inducement to ship by its line, as in *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839. Where the relationship between carrier and forwarder is of such a character, regulation of the forwarder is an appropriate and perhaps necessary means of preventing discrimination. But where the relationship of the forwarder to the carrier is only that of consignor or shipper's agent regulation of the forwarder is not necessary, since the provisions forbidding the carrier to discriminate between shippers will suffice. Similar considerations apply with respect to those who furnish "wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Such facilities are customarily furnished under some form of continuing contractual or other relationship with the common carrier by water which may result in discrimination against or unfair advantage to shippers, if those who furnish the facilities are not regulated. Such was the case in *State of California* v. *United States*, D. C. Cal., 46 F. Supp. 474, now pending in the Supreme Court, 63 S. Ct. 980,[4] the only

[4] Affirmed 320 U. S. 577, 64 S. Ct. 352.

authority brought to our attention which has construed the phrase in question. We do not believe that the Shipping Act was intended to extend to the regulation of the rates and practices of independent forwarders or furnishers of terminal facilities, who perform services solely for the shipper and at his expense and whose dealings with the carrier are limited to contracting for transportation at the carrier's established rates. Compare *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839, where forwarding services of the same character as those rendered by the present plaintiffs were held not to be "connected with such transportation" within the meaning of that phrase as used in section 15 (13) of the Interstate Commerce Act, 49 U. S. C. A. § 15 (13). The construction of the Shipping Act for which the defendant contends would expand the regulation beyond anything heretofore asserted. Even the recent Act, 56 Stat. 284, 49 U. S. C. A. § 1001 et seq., bringing domestic freight forwarders within the jurisdiction of the Interstate Commerce Commission excludes by definition forwarders who assume no responsibility for the transportation of the merchandise.

For the foregoing reasons the complaint in so far as it seeks an injunction against the order of August 21st is dismissed; an interlocutory injunction against enforcement of the order of May 18, 1943, is granted; and the defendant's motion for

summary judgment is denied. Either party may submit proposed findings of fact on five days' notice to the other.

Filed Nov. 30, 1943.

ON MOTION FOR REARGUMENT

This motion asks a modification of our opinion of November 30, 1943 in so far as it denied the defendant a summary judgment and granted the plaintiffs an interlocutory injunction against enforcement of the Commission's order of May 18, 1943. Argument of the motion was heard on December 16, 1943 and the matter was taken under advisement with leave to the attorneys to file briefs. A brief has been filed on behalf of the plaintiffs. On February 19, 1943 counsel for the defendant advised the court that he did not desire to file a brief on behalf of the defendant.

Our former decision in this case was rested upon the ground that the plaintiffs were not shown to be carrying on the business of forwarding "in connection with a common carrier by water." The opinion stated that there was nothing before the court to contradict in any essential respect the Byrne affidavit which made clear that a forwarder "acts solely as agent for the owner of goods in procuring their transportation by a common carrier by water and in performing services incidental to procuring such transportation." Mr. Hallett's affidavit in support of the motion for

reargument asserts that we overlooked certain evidence, not called to our attention upon the original argument or in the briefs then filed, which shows that the plaintiffs' activities are not limited solely to acting as agents for shippers. This evidence is to be found in five volumes containing answers to questionnaires filed with the Commission by numerous forwarders, including the plaintiffs, and submitted to the court on the argument of the original motions. It relates to two matters: (1) "contract rates" and (2) brokerage.

(1) Contract rates. Question 22 of the questionnaire requires information as to whether the forwarder who answered the question signed contracts with steamship conferences or conference carriers entitling him to contract rates. Mr. Hallett's affidavit states that 45 of the plaintiffs (without specifying which plaintiffs) made answers indicating that they did enter into such contracts. By their answer to question 23, most of the plaintiffs, Mr. Hallett says, professed to give the shipper the benefit of the contract rate but he names three plaintiffs who did not always do so. We find no copy of a contract for "contract rates" in the record. The terms of such contracts and their implications have not been submitted to us; they can be developed upon final hearing. Without knowing more we cannot say from the mere fact that some of the plaintiffs entered into contracts for contract rates, that they

were conducting their forwarding business "in connection with a common carrier" in such sense as to justify a summary judgment for the defendant. Nor is it clear to us what bearing on this question the ultimate enjoyment of contract rates, by the shipper or by the forwarder, might have. That too may be elucidated on a full hearing of the cause.

(2) Brokerage. From the answers to questions 29, 30 and 31 of the questionnaire it appears that every plaintiff receives a commission or brokerage fee from the carrier with respect to shipments for which he acts as forwarder; all but six do this in cases where they make the shipments in their own names as shipper on the bill of lading; and every plaintiff collects forwarding fees from the shipper on the same shipment on which it collects brokerage from the carrier. Some of the plaintiffs say that their forwarding fees are based on the assumption that they will collect 1¼% brokerage on ocean freight. Hence the defendant argues that receipt of brokerage from the carrier, where broker and forwarder are one, shows that each plaintiff carries on the business of fowarding in connection with a common carrier by water and is therefore within the statutory definition of 46 U. S. C. A. § 801. The plaintiffs answer that payment of brokerage is provided for in the carriers' tariffs, and that the legality of the practice has been recognized by the Commission in Gulf Brokerage and Forwarding Agreements, 1 U. S.

M. C. 533. This was a proceeding concerning 92 agreements filed for approval under § 15 of the Shipping Act, 46 U. S. C. A. § 814, by common carriers by water in foreign commerce and other persons termed brokers. The agreements purported to fix the amounts of commissions the carriers would pay such other persons for brokerage services, and also the amounts of the charges to be collected from shippers for forwarding services to be performed by the carriers and such other persons. An order was entered denying approval of the proposed agreements and discontinuing the proceeding without prejudice to the filing of new agreements as indicated in the opinion. The opinion states: "Brokers are not subject to the Shipping Act of 1916 and consequently agreements between carriers subject to that Act and brokers are not of the character required to be filed under § 15 thereof."

The mere receipt of brokerage from a carrier by one who is also a forwarder connotes no contract between the payor and payee other than that which arises out of the contract of affreightment. There is no implication that the forwarder agrees with the carrier to refuse to handle shipments as to which the shipper has specified routing by a competing carrier (which as the Commission noted in the opinion just discussed, it would not approve). We do not think the receipt of brokerage pursuant to a carrier's filed tariff

proves that the forwarder who receives it carries on the business of forwarding "in connection with the carrier."

The evidence called to our attention by the motion for reargument does not justify the granting of a summary judgment for the defendant. Consequently we adhere to our former opinion and for the reasons therein stated think that an interlocutory injunction should be granted the plaintiffs.

Filed Mar. 8, 1944.

United States District Court, Southern District of New York

Civ. 20–360

AMERICAN UNION TRANSPORT, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

This cause having come on for trial before the undersigned on the 9th day of November, 1944, and the proofs of both parties having been adduced, and the plaintiffs having appeared by Harold L. Allen, Esq., and the defendant having appeared by John F. X. McGohey, United States Attorney for the Southern District of New York (Marvin M. Notkins, Assistant United States Attorney, of counsel), the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The plaintiffs are corporations, copartnerships and individuals engaged in business in the Port of New York, Southern District of New York, as forwarders of freight "in foreign commerce".

2. The plaintiffs brought this action against the United States pursuant to Title 46, U. S. Code,

Section 830, to set aside orders hereafter described of the United States Maritime Commission.

3. One of the orders of said Maritime Commission which the plaintiffs sought to set aside was issued on August 21, 1942, in a proceeding entitled "Port of New York Freight Forwarders Investigation, Docket No. 621." Said order recited that each of the plaintiffs and a large number of other persons, who are not parties to this action, were engaged in the business of forwarding in foreign commerce; that each of them is an "other person subject to" the Shipping Act of 1916 as amended; that the public interest requires a general inquiry to determine the extent of the existence of certain practices and the lawfulness thereof under said Act; and it ordered that said Maritime Commission upon its own motion and without formal pleadings "enter upon an investigation with a view toward making such order or orders or taking such other action in the premises as may be warranted by the record".

4. Said order of August 21, 1942 does not of itself adversely affect plaintiffs; it does not constrain them to do or refrain from doing anything, and accordingly by an order of this Court dated June 12, 1944 the complaint was dismissed in so far as it sought an injunction against said order of the Maritime Commission dated August 21, 1942.

5. On January 14, 1943, said Maritime Commission issued an order which directed the plaintiffs to answer within thirty days a questionnaire thereto annexed which required a lengthy report of business transacted during specified periods in 1940, 1941 and 1942, with breakdowns of their receipts and disbursements. The time for furnishing the required information was extended to April 15, 1943, and again to June 1, 1943. Said order of January 14, 1943 bore no approval of the Director of the Bureau of the Budget prior to its issuance and service upon the plaintiffs. The plaintiffs prayed for an injunction against the enforcement of said order but on May 18, 1943 said Maritime Commission vacated its order of January 14, 1943.

6. On May 18, 1943 said Maritime Commission made a new order which directed the plaintiffs to answer within forty-five days, under penalty of forfeiting one hundred dollars for each day of default, as provided in 46 U. S. Code, Section 820, a questionnaire thereto annexed which required a lengthy report of plaintiffs' business and directed them to file with said Maritime Commission a true and accurate report of 105 individual forwarding transactions, 35 of which were billed consecutively to their customers commencing January 1, 1940, 35 of which were billed consecutively to their customers commencing June 1, 1941, and 35 billed consecutively to their customers commencing June

1, 1942. Said order of May 18, 1943 bears the approval of the Director of the Bureau of the Budget.

7. The plaintiffs have not formally amended their complaint to cover the order of May 18, 1943, but a copy of said order is annexed to the answer of the defendant and by the consent of both parties the question of the validity of said order has been submitted to this Court. All allegations in the complaint with respect to the order of January 14, 1943 except those referring to the failure to submit the questionnaire to the Director of the Bureau of the Budget are deemed to refer to the order of May 18, 1943.

8. All of the plaintiffs are engaged in the business of shippers' agents and freight brokers; they arrange as agents for others for insurance, cartage, warehousing and other services incidental to and including the affreightment of merchandise consigned to and from points within the United States from and to points outside thereof. They do not assume responsibility for the delivery of the merchandise at destination.

9. The plaintiffs usually take the bill of lading in the name of the owner of the goods. Occasionally the bill of lading is taken in the name of the plaintiff forwarder, if the goods being shipped are similar in character and bound for the same port and the same consignee. As forwarders, the plaintiffs perform services solely for the shipper and at his expense.

10. The plaintiffs also act as freight brokers. When a plaintiff as forwarder also acts as freight broker, he receives a brokerage commission or fee from the carrier with respect to the shipment for which he acts as forwarder and collects a forwarding fee from the shipper.

11. The plaintiffs have no continuing contractual or other relationship with the common carriers by water over whose lines they ship merchandise.

12. After the issuance of its order of August 21, 1942 said Maritime Commission sent to the plaintiffs a questionnaire which contained the question: "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" All the plaintiffs answered this question in the affirmative. In their complaint in this action the plaintiffs allege that their their answer to the aforesaid question was erroneous. The evidence before this Court contradicts the admission made by said affirmative answer. The plaintiffs do not carry on the business of forwarding in connection with common carriers by water within the meaning of the Shipping Act of 1916 as amended.

CONCLUSIONS OF LAW

1. This Court was duly convened pursuant to 28 U. S. C. § 47 and has jurisdiction pursuant to Section 31 of the Shipping Act of 1916 as amended, 46 U. S. C. § 830.

2. The plaintiffs are not "other persons subject to" the Shiping Act of 1916 as amended.

3. The Maritime Commission lacks jurisdiction to direct the plaintiffs to answer the questionnaire annexed to its order of May 18, 1943.

4. The plaintiffs are entitled to a permanent injunction against the enforcement of said order of May 18, 1943.

THOMAS W. SWAN,
U. S. C. J.

ALFRED C. COXE,
U. S. D. J.

FRANCIS G. CAFFEY,
U. S. D. J.

Dated: New York, N. Y. November 29, 1944.

FILED Nov. 30, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1945